No. 89-1921

In the Supreme Court of the United States

OCTOBER TERM, 1990

ANTHONY J. VARCA AND MARK A. VARCA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly denied petitioners' request, made on the eve of trial, to remove their attorneys for an alleged conflict of interest.

2. Whether 18 U.S.C. 4205(b)(1), which was repealed as of November 1, 1987, gave the district court authority to direct that petitioners serve 15 years of their 52-year sentences before becoming eligible for parole.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 896 F.2d 900.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1990. A petition for rehearing was denied on April 4, 1990. Pet. App. 22-23. The petition for a writ of certiorari was filed on June 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were con-

victed of conspiring to import 51,210 pounds of marijuana (Count 1), in violation of 21 U.S.C. 952 and 963; attempting to import marijuana (Count 2), in violation of 21 U.S.C. 952 and 963; conspiring to possess marijuana with intent to distribute it (Count 3), in violation of 21 U.S.C. 841(a)(1) and 846; and possessing marijuana in Customs waters with intent to distribute it (Count 4), in violation of 21 U.S.C. 955a(c). They were sentenced to consecutive terms of 13 years' imprisonment on each count. Pursuant to 18 U.S.C. 4205(b)(1) (1982), petitioners were ordered to serve a minimum of 15 years' imprisonment before they would be eligible for parole. In addition, petitioners were each fined $500,000. The court of appeals affirmed.

1. Briefly summarized, the evidence at trial showed that petitioners – father and son – owned and operated numerous vessels in Florida. In 1984, they agreed to supply Randy Fink with a ship, the *Ocean Crown*, which would be used to import 60,000 pounds of marijuana from Colombia. They also helped Fink launder the funds to finance the venture through a bank in the Cayman Islands. Fink agreed to divide with petitioners the $6 million that he expected to earn from the sale of the marijuana. In November 1984, petitioner Mark Varca captained the *Ocean Crown* as he and his crew sailed for Colombia. The ship sank before it reached South America, and Mark and his men were rescued and returned to Florida. Gov't C.A. Br. 3-4, 9.

In 1985, petitioners supplied Fink with three ships to pick up the marijuana – one ship to carry the contraband and two ships to serve as decoys. Petitioners directed the vessels from Florida. The *Blue Star* picked up the marijuana off the coast of Colombia. At petitioners' direction, the marijuana was then transferred to another ship, the *MacVie*. The *Blue Star* and a third vessel, the *Island Venturer*, then led the *MacVie* through the Yucatan straits toward New

Orleans. Fink and his men were waiting in New Orleans to receive the contraband. Gov't C.A. Br. 4-8.

While the ships were at sea, petitioners attempted to buy a piece of property near New Orleans with deep water access that could be used as an offloading site for the marijuana. When the sale could not be completed in time, Fink instead used a site recommended by two corrupt U.S. Customs agents. Meanwhile, the FBI infiltrated Fink's organization. In August 1985, while the marijuana was being transferred from the *MacVie* to a shrimp boat near the Mississippi delta, the FBI arrested many of the participants in the smuggling scheme, including Fink and the crews of two of petitioners' vessels. Upon learning of the arrests, petitioners fled their homes in Ft. Lauderdale, Florida. They were not apprehended until October 1987. Gov't C.A. Br. 7-10.

2. Following their arrests, petitioners jointly retained James O'Connor to represent them on the smuggling charges. Because O'Connor also represented two co-conspirators who might be called as witnesses at petitioners' trial, the district court advised petitioners of their right to conflict-free counsel and of the perils of joint representation. Petitioners would not waive their right to conflict-free counsel, so the district court disqualified O'Connor and ordered petitioners to find new lawyers. Gov't C.A. Br. 18.

Petitioners eventually retained Arthur Lemann and John Reed. Lemann and a member of Reed's firm also represented the Customs agents, who had been indicted separately from petitioners. The agents had already been tried once but were awaiting a retrial when petitioners retained Lemann and Reed.[1] At the first trial, the agents

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[1] At their first trial, the Customs agents were acquitted on two counts, and the jury could not reach a verdict on the other two. The agents were awaiting a retrial on a superseding indictment. See *United States*

denied that they had any knowledge of the smuggling venture. Gov't C.A. Br. 22.

In December 1987, Lemann informed the district court that he also represented one of the Customs agents.[2] In March 1988, Lemann and Reed asked to withdraw as counsel for petitioners, setting forth their reasons in sealed affidavits.[3] Petitioners objected, explaining to the court that they had selected their new counsel by reading the transcripts of the Customs agents' first trial. Petitioners described their attorneys as "capable" and "excellent," and informed the court that the only problem between them and their counsel was a "money problem." Gov't C.A. Br. 19-20. The district court denied Lemann and Reed's motion to withdraw.

Over the next few months, the district court conducted hearings on petitioners' claim that in August 1985 their ships were on a mission personally authorized by deceased CIA Director William Casey. Gov't C.A. Br. 35-37. On September 12, 1988, the day on which petitioners' trial was scheduled to begin, petitioners proffered for the first time a new theory of defense. They claimed that they had been set up by the Customs agents. Petitioners complained that they had a conflict with their counsel because they wanted

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v. *Deerman*, 837 F.2d 684 (5th Cir.), cert. denied, 109 S. Ct. 146 (1988). At their retrial, the Customs agents were convicted on all counts of the superseding indictment. Gov't C.A. Br. 22-23.

[2] Lemann also advised the district court that John Lawrence, an attorney who had previously rented office space from him, represented yet another co-conspirator, Edward Misseck. Misseck had pleaded guilty and was expected to testify for the government. Lemann advised the court that he had never assisted Lawrence in his representation of Misseck and that he had not shared in Lawrence's fee. Furthermore, Lemann and Lawrence were no longer sharing office space. The district court found no basis for disqualifying Lemann on account of his past association with Lawrence. Gov't C.A. Br. 19.

[3] The government has never seen these affidavits.

to subpoena the agents, who were still awaiting their retrial, as defense witnesses. Petitioners did not at that time ask the court to discharge Lemann and Reed or to appoint different counsel. Gov't C.A. Br. 20-21.

Two days later, after the jury was selected and sworn, petitioners moved to disqualify Lemann and Reed for a conflict of interest. Petitioners acknowledged that the Customs agents would have to incriminate themselves in order to testify in support of their new theory, and that they did not know whether the Customs agents would be willing to waive their Fifth Amendment privilege against compulsory self-incrimination. Petitioners advised the court that they did not want to represent themselves, but instead wanted a continuance to find new counsel. The district court denied petitioners' motions, and they were represented at trial by Lemann and Reed. Gov't C.A. Br. 21.

3. The court of appeals affirmed. The court held that it was "not persuaded that [attorneys Lemann and Reed] had willfully labored under an irreconcilable conflict of interest." Pet. App. 12. The court noted that petitioners had selected Lemann and Reed after having been advised of their right to conflict-free counsel and after having read the transcripts of the Customs agents' first trial. *Ibid.* The court found it hard to believe that Lemann and Reed would not have informed the court of a conflict, if one existed, particularly since they had sought permission to withdraw as counsel. *Id.* at 13. And the court refused to believe petitioners' claim that the alleged conflict "reared its ugly head only on the eve of trial." *Ibid.* The court of appeals thus held that it "was within the district court's discretion to deny this eleventh hour tactic which it viewed as nothing more than an effort to delay the trial." *Id.* at 14.

The court of appeals also affirmed the district court's decision to defer petitioners' parole eligibility until they had served 15 years of their 52-year sentences. Pet. App. 20.

The court held that 18 U.S.C. 4205(b) (1982) permitted the district court to set parole eligibility "at any point during the first third of the prison sentence." Pet. App. 21.

ARGUMENT

1. Attorneys Arthur Lemann and John Reed were not disabled by a conflict of interest. The district court therefore properly denied petitioners' untimely motion to disqualify their attorneys and to postpone the trial until they could obtain new counsel. Contrary to petitioners' claim, the decision below does not conflict with any decision of this Court or another court of appeals. Accordingly, further review of this fact-bound issue is not warranted.

To establish a Sixth Amendment violation, a defendant must show an actual conflict of interest, that is, that "his counsel actively represented conflicting interests." *Cuyler* v. *Sullivan*, 446 U.S. 335, 348, 350 (1980). In this case, there was no conflict. The Customs agents were not named in the same indictment as petitioners, and they were not joined for trial with petitioners. See *Burger* v. *Kemp*, 483 U.S. 776, 783-788 (1987) (no conflict where one attorney represented co-defendants who were tried separately). Compare *Holloway* v. *Arkansas*, 435 U.S. 475 (1978) (conflict where one attorney represented three defendants in a single trial). Nor did the Customs agents appear as witnesses against petitioners. Indeed, no government witness mentioned the Customs agents at trial, nor did the government allege that petitioners had had any contact with the Customs agents.

Moreover, although both the agents and petitioners participated in the same conspiracy, their roles were very different. Petitioners operated out of Florida, and they controlled the vessels and the crews. The Customs agents stayed

in New Orleans and provided Fink with information through a conduit. In fact, the agents insulated themselves from any direct contact with Fink or any of the other members of the conspiracy. See *United States* v. *Deerman*, 837 F.2d 684 (5th Cir.), cert. denied, 109 S. Ct. 146 (1988). Furthermore, petitioners did not show that the agents would have exculpated them if called to testify. At the time of petitioners' trial, the agents were awaiting their own retrial, and petitioners made no showing that if subpoenaed, the agents would have forgone their Fifth Amendment privilege and incriminated themselves by testifying that they collaborated with Fink to set up petitioners. This scenario is particularly unlikely since at their first trial the Customs agents had denied that they had any knowledge of the smuggling venture. See *United States* v. *Deerman*, 837 F.2d at 687-688.

The district court was well acquainted with the history of this case and could determine without a hearing that petitioners' eleventh-hour conflict claim was bogus. Although nine months had passed since petitioners hired Lemann and Reed, and although petitioners knew from the outset that their attorneys also represented the Customs agents, they waited until the commencement of trial to allege that the Customs agents were somehow relevant to their defense.

A district court does not have to conduct an inquiry into every frivolous allegation of a conflict of interest. See *Cuyler* v. *Sullivan*, 446 U.S. at 346-347 (Sixth Amendment does not require trial court to initiate inquiry into the propriety of multiple representation in every case). In this case, in particular, there was no need to ask the views of either defense counsel or the prosecutor on the conflict issue. *Id.* at 347 ("trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel"). Lemann and Reed had previously moved to withdraw as petitioners' counsel; had they thought that their representation of the Customs agents created a conflict, they surely

would have adverted to the conflict in support of their motion. Likewise, the prosecutor undoubtedly would have sought Lemann and Reed's disqualification at the outset, as he did with O'Connor, if the prosecutor had seen any possible conflict of interest.

This Court has recognized that last-minute conflict claims are sometimes raised to delay or disrupt trial, and that the trial court must be able to deal with a defendant who resorts to such tactics. *Holloway* v. *Arkansas*, 435 U.S. 475, 486-487 (1978). Under the circumstances, the trial court was justified in finding the claim of conflict to be pretextual. The trial court therefore acted within its authority in denying petitioners' last-minute motions to discharge their attorneys and for a continuance.

The cases on which petitioners rely do not conflict with the decision below. Those cases merely hold that where there is an actual conflict of interest, the trial court must conduct a hearing to determine whether the defendant wishes to waive his right to conflict-free counsel. See, *e.g.*, *United States* v. *Ziegenhagen*, 890 F.2d 937 (7th Cir. 1989) (actual conflict where defense counsel previously prosecuted the defendant for predicate felonies); *Fitzpatrick* v. *McCormick*, 869 F.2d 1247, 1251-1253 (9th Cir. 1989) (actual conflict where the same attorney represented a co-defendant in the first murder trial, the defendant claimed that the co-defendant committed the murder, the co-defendant denied it, and defense counsel believed the co-defendant and refused to pursue that defense); *United States* v. *Lawriw*, 568 F.2d 98, 101-105 (8th Cir.) (actual conflict where one attorney represented co-defendants in a joint trial), cert. denied, 435 U.S. 969 (1978); *Singley* v. *United States*, 548 A.2d 780, 784 (D.C. 1988) (actual conflict where defense counsel previously represented a government witness). The Fifth Circuit has a similar requirement, see *United States* v. *Garcia*, 517 F.2d 272, 278 (1975), yet it found no viola-

tion in this case because there was no actual conflict of interest and because petitioners were advised of the perils of multiple representation before they retained Lemann and Reed. Accordingly, petitioners have not shown that their claim would have succeeded in any court of appeals.

2. Petitioners also contend (Pet. 34-45) that the district court lacked authority to provide that they would be ineligible for parole for 15 years. In ordering that petitioners would not be eligible for parole for the first 15 years of their 52-year sentences, the district court relied on 18 U.S.C. 4205(b)(1) (1982), which provided that a sentencing judge could designate "a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court." The court of appeals agreed that Section 4205(b)(1) authorized the 15-year parole sentence. Relying on a different provision, 18 U.S.C. 4205(a) (1982), four courts of appeals have held that judges sentencing under the pre-1987 federal sentencing scheme could not mandate a no-parole period of more than ten years, no matter how long the sentence that the court imposed. See *United States* v. *Hagen*, 869 F.2d 277 (6th Cir.), cert. denied, 109 S. Ct. 3228 (1989); *United States* v. *DiPasquale*, 859 F.2d 9 (3d Cir. 1988); *United States* v. *Castonguay*, 843 F.2d 51 (1st Cir. 1988); *United States* v. *Fountain*, 840 F.2d 509 (7th Cir. 1988), cert. denied, 109 S. Ct. 533 (1988). Four other courts of appeals have agreed with the court below that former 18 U.S.C. 4205(b)(1) authorized the imposition of a minimum term of up to one-third of the maximum sentence, even if that minimum term exceeded ten years. *United States* v. *Parker*, 881 F.2d 945 (10th Cir. 1989), cert. denied, 110 S. Ct. 1141 (1990); *United States* v. *Whitworth*, 856 F.2d 1268 (9th Cir. 1988), cert. denied, 109 S. Ct. 1541 (1989); *United States* v. *Berry*, 839 F.2d 1487 (11th Cir.), cert. denied, 109 S. Ct. 863 (1989);

United States v. *Gwaltney*, 790 F.2d 1378 (9th Cir. 1986), cert. denied, 479 U.S. 1104 (1987); *Rothgeb* v. *United States*, 789 F.2d 647 (8th Cir. 1986); *United States* v. *O'Driscoll*, 761 F.2d 589 (10th Cir. 1985), cert. denied, 475 U.S. 1020 (1986).

Despite the conflict in the circuits, this issue is of no continuing importance because Section 4205 was repealed effective November 1, 1987, by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 218(a)(5), 235, 98 Stat. 2027, 2031, as amended by the Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728. The issue therefore affects only the rapidly diminishing and closed set of cases involving prosecutions for criminal conduct completed before November 1, 1987.

Not only is the issue of diminishing importance, but there is nothing about the circumstances of this case that makes the issue a particularly compelling candidate for review as it affects these defendants. Petitioners were sentenced to 52 years' imprisonment, and they are therefore statutorily ineligible for parole for at least ten years. See 18 U.S.C. 4205(a) (1982). In light of the length of their sentences and the nature of their offenses, it is highly unlikely that the Parole Commission would grant petitioners parole before they had served at least 15 years of their sentences. Petitioners had a prominent role in this multi-million dollar smuggling venture; they admitted that much of their business came from drug traffickers (Gov't C.A. Br. 13); and they fled following Fink's arrest and assumed new identities in order to avoid prosecution (see Gov't C.A. Br. 10). Moreover, the no-parole period of petitioners' sentence is consistent with (indeed, more lenient than) the sentences that similarly situated drug smugglers currently receive under the federal Sentencing Guidelines for offenses committed after November 1, 1987. Under the Guidelines, a person who imports more than 100,000 kilograms of marijuana will usually

be sentenced to at least 24 years' imprisonment, with no opportunity for parole. Sentencing Guideline ch. 2, Pt. 2, § 2D1.1 (1989); *id.* ch. 5, Pt. A (sentencing table). The 15-year no-parole portion of petitioners' sentences is therefore unlikely to affect the date of their actual release, and it does not result in forcing them to serve a disproportionate term of imprisonment. Consequently, further review of petitioners' sentence is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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